"MONOPOLY" UNDER THE NATIONAL ANTI-TRUST ACT.

I.

THE Anti-Trust Act, passed by Congress July 2, 1890, provides, among other things, as follows: —

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.

"Every person who shall make any contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Seven offences are defined under these sections, to wit: (1) Contract in restraint of interstate or foreign trade or commerce; (2) Combination in the form of trust or otherwise in restraint of such trade or commerce; (3) Conspiracy in restraint of such trade or commerce; (4) Monopoly of any part of such trade or commerce; (5) Attempt to monopolize any part of the same; (6) Combination to monopolize any part of the same; (7) Conspiracy to monopolize any part of the same.

II.

Interpretation of the Statute in the Light of the Common Law.

It is a well-established doctrine in Federal jurisprudence that there are no common law offences against the United States. United States *v.* Hudson, 7 Cr. 32; United States *v.* Coolidge, 1 Wheat. 415; United States *v.* Britton, 108 U. S. 199, 206; Man-

chester *v.* Mass., 139 U. S. 240, 262 *et* 3; United States *v.* Eaton, 144 U. S. 677, 687. In other words, the criminal jurisdiction of the courts of the United States is wholly statutory. Manchester *v.* Mass., 139 U. S. 240, 262, and cases cited *supra.* But, nevertheless, the common law may be resorted to for definition of common law terms employed by Congress in legislation. For example: "utters," United States *v.* Carll, 105 U. S. 611; "embezzles," United States *v.* Britton, 107 U. S. 655, 669; United States *v.* Northway, 120 U. S. 327, 334; and "murder," Ball *v.* United States, 140 U. S. 118. So, analogously, under the present Act, the courts have looked to the common law for the interpretation of the words and phrases: "monopoly," *In re* Corning, 51 F. R. 205, 211 *et* 212; *In re* Greene, 52 F. R. 104, 115; United States *v.* Trans. Mo. Freight Association, 53 F. R. 440, 452; "contract," *In re* Greene, 52 F. R. 111; "combination," *In re* Greene, 52 F. R. 111; "conspiracy," *In re* Greene, 52 F. R. 111; "in restraint of trade," *In re* Corning, 51 F. R. 211; *In re* Greene, 52 F. R. 111; United States *v.* Patterson, 55 F. R. 605, 640. This view, furthermore, coincides with the express intention of Congress when passing the Act, as is shown by the remarks of Senator Edmunds in the Senate upon report of it in its final form from the Judiciary Committee: —

"We all felt it; and the Committee — I think unanimously, including my friend from Mississippi [Senator George] — thought that if we were really in earnest in wishing to strike at these evils broadly, in the first instance, as a new line of legislation, we would frame a bill that should be clearly within our constitutional power, *that we should make its definition out of terms that were well known to the law already*" (21 Cong. Rec. 3148).

III.

MONOPOLY.

A "monopoly" is defined by Lord Coke as follows: —

"A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade" (3 Inst. 181).

And by Hawkins, as follows: —

"A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of anything, whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before" (Hawk. P. C., bk. i. c. 79).

And by Popham, C. J., in the Case of Monopolies: —

"And this word *monopolium dicitur* ἀπὸ τοῦ μόνου ἢ πωλέω, *quod est, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens*" (2 Co. 84, 86).

"Monopolies," in the above sense, became especially common in the reign of Queen Elizabeth, who granted great numbers of them to her favorite courtiers. Hume thus describes them in his History of England: —

"The active reign of Elizabeth had enabled many persons to distinguish themselves in civil and military employments; and the queen, who was not able from her revenue to give them any rewards proportioned to their services, had made use of an expedient which had been employed by her predecessors, but which had never been carried to such an extreme as under her administration. She granted her servants and courtiers patents for monopolies; and these patents they sold to others, who were thereby enabled to raise commodities to what price they pleased, and who put invincible restraints upon all commerce, industry, and emulation in the arts. It is astonishing to consider the number and importance of those commodities which were thus assigned over to patentees. Currants, salt, iron, powder, cards, calf-skins, fells, pouldavies, ox-shin-bones, train-oil, lists of cloth, potashes, anise-seeds, vinegar, seacoals, steel, aquavitæ, brushes, pots, bottles, saltpetre, lead, accidences, oil, calamine stone, oil of blubber, glasses, paper, starch, tin, sulphur, new drapery, dried pilchards, transportation of iron ordnance, of beer, of horn, of leather, importation of Spanish wool, of Irish yarn: these are but a part of the commodities which had been appropriated to monopolists. When this list was read in the House, a member cried, 'Is not bread in the number?' 'Bread!' said every one with astonishment. 'Yes, I assure you,' replied he, 'if affairs go on at this rate, we shall have bread reduced to a monopoly before next parliament.' These monopolists were so exorbitant in their demands that in some places they raised the price of salt from sixteen pence a bushel to fourteen or fifteen shillings. Such high profits naturally begat intruders upon their commerce; and in order to secure themselves against encroachments, the patentees were armed with high and arbitrary powers from the Council, by which they were enabled to oppress the people at pleasure, and to exact money from such as they thought proper to accuse of interfering with their patent. The patentees of saltpetre, having the

power of entering into every house, and of committing what havoc they pleased in stables, cellars, or wherever they suspected saltpetre might be gathered, commonly extorted money from those who desired to free themselves from this damage or trouble. And while all domestic intercourse was thus restrained, lest any scope should remain for industry, almost every species of foreign commerce was confined to exclusive companies, who bought and sold at any price that they themselves thought proper to offer or exact" (4 History of England, Harper's ed., 335–336).

The "monopolies" here described were nothing more than royal patents; and restriction of competition under them was effected, not by the act of the individual, but by the exclusive character of the grant.

The question of the legality of such licenses first arose, in 1602, in the case of Darcy *v.* Allen, 11 Co. 84; Noy, 173; Moore, 673; 8 Co. 125. The plaintiff in this case had received a patent which gave him the exclusive privilege for twenty-one years of manufacturing playing-cards. This right was infringed by the defendant, and the plaintiff brought a suit for damages. The defendant set up the illegality of the plaintiff's patent. The grant was declared void for the following reasons: —

"(1) All trades, as well mechanical as others, which prevent idleness (the bane of the Commonwealth), and exercise men and youth in labor, for the maintenance of themselves and their families, and for the increase of their substance, to serve the queen when occasion shall require, are profitable for the Commonwealth; and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject.

"(2) The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees.

"(3) The queen was deceived in her grant; for the queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public.

"(4) This grant is *primæ impressionis*, for no such was ever seen to pass by letters patents under the great seal before these days, and therefore it is a dangerous innovation, as well without any precedent or example as without authority of law or reason."

"Monopolies" were also said to have the following inseparable incidents: —

"(*a*) That the price of the same commodity will be raised; for he who has the sole selling of any commodity may and will make the price as he pleases.

"(*b*) That after the monopoly granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the Commonwealth.

"(*c*) It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary."

Notwithstanding that these patents were declared void at common law, in order to do away with the abuse beyond question Parliament in 1623 passed the statute against "monopolies," which, among other things, provided as follows: —

"That all monopolies, and all commissions, grants, licenses, charters, and letters patents heretofore made or granted, or hereafter to be made or granted, to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything within this realm, or the dominion of Wales, or of any other monopolies, or of power, liberty, or faculty to dispense with any others, . . . are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution."

No criminal penalty was enacted by this statute; but a civil remedy, at common law, with treble damages, was provided, in case of any one "hindered, grieved, disturbed, or disquieted, or his . . . goods or chattels any way seized, attached, distrained, taken, carried away, or detained, by occasion or pretext of any monopoly."

Also, *at common law*, there was no such *offence* as "monopolizing." The case cited by Coke in his Institutes, to the effect that there was, is a case of "procuring a license" for the "sole sale of sweet wines in London," and not of "monopolizing" under a patent, or, for that matter, without one (3 Inst. 181). Furthermore, there is supposed to be very slight authority for Coke's citation. See Hawk. P. C., bk. i. c. 79 (ed. 1795, at p. 294).

It is thus plain (1) that Congress could not have had in mind a "monopoly" in the *common law* sense of the term; (2) that "monopoly" *at common law* implied an *exclusive* control of one branch of industry, without *legal right* of any other person to interfere therewith by competition or otherwise.

IV.

ENGROSSING.

This word is not used in the statute, but it is a term so commonly assimilated with "monopolizing" as to be often mistaken for it. So authoritative a writer as Hawkins says, —

"'Monopoly' differs from '*engrossing*' only in this, that 'monopoly' is by patent from the king, and 'engrossing' by the act of the subject between party and party."

So, likewise, Blackstone, —

"'Monopolies' are much the same offence in other branches of trade that 'engrossing' is in provisions, being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever."

Also, Pollexfen, in his argument in East India Company *v.* Sandys, Skin. 165, 169: —

"By common law, he said that trade is free, and for that cited 3 Inst. 81; F. B. 65; 1 Roll. 4; that the common law is as much against 'monopoly' as 'engrossing;' and *that they differ only, that a 'monopoly' is by patent from the king, the other is by the act of the subject between party and party;* but that the mischiefs are the same from both, and there is the same law against both. Moore, 673; 11 Rep. 84. The sole trade of anything is 'engrossing' *ex rei natura*, for whosoever hath the sole trade of buying and selling hath 'engrossed' that trade; and whosoever hath the sole trade to any country, hath the sole trade of buying and selling of the produce of that country, at his own price, which is an 'engrossing.'"

It becomes necessary, therefore, to consider the nature of "engrossing," with a view to the light that it may throw upon the meaning of "monopolizing."

1. "Engrossing" was confined to "trading."[1] It not only was effected without "patent of the king," but also did not include "artisanship" or "manufacturing." The statute of 5 & 6 Edw. VI., which created the offence, provided, "Whatsoever person

[1] "Engrossing" was defined by the statute of 5 & 6 Edw. VI. c. 14, as follows: "Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful *engrosser* or *engrossers*."

or persons engross or get into his or their hands *by buying, contracting, or promise-taking.*"

2. "*Engrossing*" *was limited to the necessaries of life in the nature of provisions and the like.* Cro. Jac. 214 (1609); 13 Co. 18 (1609); Pettamberdass *v.* Thackoorseydass, 7 Moore's P. C. Cas. 239, 262 (1850). The statute of 5 and 6 Edw. VI., cited *supra*, expressly specified the articles therein included: "Any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual whatsoever." The statute seems to have been held as embracing: (*a*) "corn," 2 Leon. 38 (1588); Lane, 59 (1610); 2 Buls. 317 (1615); 1 Roll. 134 (1615); 2 Roll. 33 (1619); 6 Mod. 32 (1704); (*b*) "fish," 2 Buls. 248, *n.* (1614); 1 Roll. 12 (1615); Cro. Car. 314 (1634); Jones, 320 (1634); (*c*) "butter and cheese," Jones, 156 (1623); (*d*) "salt," Cro. Car. 231 (1632); Sty. 190 (1649); (*e*) "straw and hay," Cro. Car. 380 (1635); (*f*) "oats," Hard. 231 (1663); (*g*) "wild-fowl," 1 Ld. Raym. 475 (1700); but not (*h*) "apples," Cro. Jac. 214 (1609); 13 Co. 18 (1609),[1] Sty. 190 (1649); or (*i*) "pears" or "cherries," Sty. 190 (1649); or (*j*) "hops," Cro. Car. 231 (1632); Sty. 190 (1649); or (*k*) "barley" converted into "malt," Godb. 144 (1587); Owen, 135 (1612); or (*l*) "corn" converted into "meal," Moore, 595 (1593); Owen, 135 (1612); or (*m*) "meal" or "wheat" converted into "starch," 4 Leon. 240, 241 (1611); Owen, 135 (1612); Bridge, J., 5 (1621). In 1800, "engrossing" of hops (differing herein from the case above) was held to be an offence, *at common law*, on the ground that the uses to which hops had more recently been put had changed these into necessaries. Rex *v.* Waddington, 1 East, 143, 155 *et* 6 (1800).

3. "*Engrossing*" *must be accompanied with an intent to re-sell.* The statute of 5 & 6 Edw. VI. c. 14, reads: "To the intent to sell the same again." Bristow *et al.*, Exors., *v.* Waddington, 2 Bos. & Pul. N. R. 355 (1806). And the identity of the article purchased must remain unchanged. Cases of conversion, cited *supra.*

4. *The quantity "engrossed" need not be the whole, or approxi-*

[1] See distinction drawn in the opinion: "Also, always after the said Act [5 & 6 Edw. VI. c. 14], they have bought apples and other fruits by ingross, and sold them again, and before this time no information was exhibited for them, no more than for plums or other fruit, *which serveth more for delicacy than for necessary food.*"

mately the whole, of the given thing. It is sufficient if it be some considerable portion thereof. For instance: it apparently was "engrossing" to purchase "1000 quarters [that is, 8000 bushels] of corn," Lane, 59 (1610); "400 quarters [that is, 3200 bushels] of wheat," Bridge, J., 5 (1621); "672 pounds of butter, and 18,432 pounds of cheese," Jones, 156 (1623); "100 bushels of salt," Cro. Car. 231 (1632); "a great quantity of straw and hay," Cro. Car. 380 (1635); "1600 bushels of oats," Hard. 231 (1663); "great numbers of wild-fowl," 1 Ld. Raym. 475 (1700); "a great quantity of corn," 6 Mod. 32 (1704).

It is impossible, therefore, in view of the foregoing, to consider "engrossing" as having any relation to "monopolizing," and there was, in fact, no such purpose in the statute of 5 & 6 Edw. VI. c. 14. Its aim was simply to do away with middle-men and wholesale traders, and so to bring consumers into direct communication with producers. In this particular, the offence was like the crimes of "forestalling" and "regrating," which were also made penal by the same statute.[1] Adam Smith, in his Wealth of Nations, published in 1776, describes the purpose of the statute correctly: —

"Our ancestors seem to have imagined that the people would buy their corn cheaper of the farmer than of the corn merchant, who, they were afraid, would require, over and above the price which he had paid to the

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[1] A "forestaller" was defined by 5 & 6 Edw. VI. c. 14, as follows: "Whatsoever person or persons . . . shall (1) buy or cause to be bought any merchandise, victual, or anything whatsoever, coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek, or road of this realm, or Wales, from any parts beyond the sea to be sold; or (2) make any bargain, contract, or promise for the having or buying of the same, or any part thereof, so coming as aforesaid, before the said merchandise, victual, or other thing, shall be in the market, fair, city, port, haven, creek, or road, ready to be sold; or (3) shall make any motion by word, letter [message], or otherwise, to any person or persons for the enhancing of the price or dearer selling of any thing or things above mentioned; or (4) else dissuade, move, or stir any person or persons, coming to the market or fair, to abstain or forbear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek, or road, to be sold as is aforesaid, shall be deemed, taken, and adjudged a *forestaller*."

And a "regrator" was defined by said statute as follows: "Whatsoever person or persons . . . shall by any means regrate, obtain, or get into his or their hands or possession, in any fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market within this realm or Wales, to be sold and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be accepted, reputed, and taken for a *regrator* or *regrators*."

farmer, an exorbitant profit to himself. They endeavored, therefore, to annihilate his trade altogether. They even endeavored to hinder as much as possible any middle-man of any kind from coming in between the grower and the consumer" (Wealth of Nations, bk. iv. c. 5, ed. 1880, at p. 105).

"The statute of Edward VI., therefore, by prohibiting as much as possible any middle-man from coming in between the grower and the consumer, endeavored to annihilate a trade of which the free exercise is not only the best palliative of the inconveniences of a dearth, but the best preventative of the calamity; after the trade of the farmer, no trade contributing so much to the growing of corn as that of the corn merchant" (Wealth of Nations, bk. iv. c. 5, ed. 1880, at p. 109).

And in another passage he thus characterizes the legislation:

"The popular fear of engrossing or forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them than those who have been accused of the former. The law which put an end to all prosecutions against witchcraft, which put it out of any man's power to gratify his own malice by accusing his neighbor of that imaginary crime, seems effectually to have put an end to those fears and suspicions, by taking away the great cause which encouraged and supported them. The law which should restore entire freedom to the inland trade of corn would probably prove as effectual to put an end to the popular fears of engrossing and forestalling" (Wealth of Nations, bk. iv. c. 5, ed. 1880, at p. 111).

Much attention was paid to the subject of "engrossing" in the case of Rex *v.* Waddington, 1 East, 143 (1800), cited *supra.* This was a prosecution *at common law* after the repeal of the statute of 5 & 6 Edward VI. c. 14, by that of 12 George III. c. 71. Parliament had evidently intended by this latter statute to do away with the common-law offence, if any, of "engrossing," as well as the statute offence itself; but, whatever might have been the purpose of Parliament, the court held that it had not done so. It further held that "engrossing" was a *common law* offence; but about this latter point there is unquestionably some doubt. See Chit., Cr. Law, 527, *n.* (a). Many counts occur in the Waddington indictment, but all were substantially based upon the fact that, for the purpose of raising the price of hops, the defendant had contracted for one-fifth of the amount thereof grown in one season in the counties of Worcestershire and Herefordshire. The point was raised that the quantity "engrossed" was less than the whole in

the kingdom. Lord Kenyon, however, refused to sustain the objection.

"Again, it is urged that the quantity purchased cannot constitute the offence of 'engrossing,' unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. The objection is new to me; but if the opinions of Lord Mansfield, Mr. Justice Dennison, and Mr. Justice Foster are deserving of attention, there is as little in that objection as in the rest. I well remember an information moved for before them against certain persons for conspiring to 'monopolize' or raise the price of all the salt at Droitwich. They had no doubt of its constituting an offence, although it was not pretended that these persons had endeavored to 'engross' all or any considerable part of the salt in the kingdom. Nor was it questioned but that the 'monopolizing' of salt was an offence at common law."

Whether Lord Kenyon's prejudice against "forestallers," "regrators," and "engrossers"[1] be altogether creditable to him or not, it is unnecessary to say; but he was undoubtedly right in holding that there could be an "engrossing" without a "monopolizing."

The result, then, is, —

(1) That "engrossing" was by contract; (2) that it was confined to the necessaries of life; (3) that it was a mere purchase with an intent to re-sell, and did not include anything beyond a simple contract bargain; (4) that it could take place without reference to the amount of the purchase, provided that the same was sufficient to constitute "wholesale trading;" (5) that if "monopoly" ever became the offence of "engrossing," it became so, not because it was a "monopoly," but because it was also (incidentally or otherwise) "wholesale trading."

[1] In Rex *v.* Rusby, Peake's Add. Nisi Prius Cas. 189 (1800), a case *at common law* for "regrating thirty quarters [that is, two hundred and forty bushels] of oats," Lord Kenyon observed, in reference to the citation from Adam Smith hereinbefore given: "Speculation has said that the fear of such an offence is ridiculous; and a very learned man, a good writer, has said you might as well fear witchcraft. I wish Dr. Adam Smith had lived to hear the evidence of to-day, and then he would have seen whether such an offence exists, and whether it is to be dreaded. If he had not been told that cattle and corn were brought to market, and then bought by a man whose purse happened to be longer than his neighbors', so that the poor man who walks the street and earns his daily bread by his daily labor could get none but through his hands, and at the price he chose to demand; that it had been raised 3*d.*, 6*d.*, 9*d.*, 1*s.*, 2*s.*, and more a quarter on the same day, — would he have said there was no danger from such an offence?"

V.

Modern Cases of "Monopoly."

Within the past few years, since "trusts" have come into existence, the subject of "monopoly" has been given especial consideration. No criminal prosecution, however, has been brought, founded upon the common law. The question has arisen merely, either as to an *ultra vires* act of a corporation which made its charter or the act itself void, or else as to an illegal agreement in restraint of trade which was held unenforceable. Instances of the former class of cases are: Clancy *v.* Salt Manufacturing Co., 62 Barb. 395; Chicago Gas Light & Coke Co. *v.* The People's Gas Light & Coke Co., 121 Ill. 530; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; People *v.* North River Sugar Refining Co., 54 Hun, 354; People *v.* Chicago Gas Trust Co., 130 Ill. 268; People *v.* North River Sugar Refining Co., 121 N. Y. 582; State *v.* Nebraska Distilling Co., 29 Neb. 700; *In re* Richmond Retail Coal Co., 9 Ry. & Cor. L. J. 31; People *v.* American Sugar Refining Co., 7 Ibid. 83; State *v.* Standard Oil Co., 30 N. E. R. 279; Attorney-General *v.* Central R. R. Co. of New Jersey, 24 At. Rep. 964; People *v.* Milk Exchange, 30 N. E. R. 850. And of the latter: Stanton *v.* Allen, 5 Den. 434; Clancy *v.* Salt Manufacturing Co., 62 Barb. 395; Crawford *v.* Wick, 18 Oh. St. 190; The Morris Run Coal Co. *v.* The Barclay Coal Co., 68 Pa. 173; Craft *v.* McConoughy, 79 Ill. 346; Arnot, Jr., *v.* The Pittston & Elmira Coal Co., 68 N. Y. 558; Salt Co. *v.* Guthrie, 35 Oh. St. 666; Pullman Palace Car Co. *v.* Texas & Pacific Ry. Co., 11 F. R. 625; Western Union Tel. Co. *v.* Burlington & So. Western Ry. Co., 11 F. R. 1; McBirney *v.* The Consolidated White Lead Co., 9 Wk. L. Bul. 310; Hoffman *v.* Brooks, 11 Wk. L. Bul. 258; Keene *v.* Kent, 4 N. Y. St. R. 431; Mill & Lumber Co. *v.* Hayes, 76 Cal. 387; Mallory *v.* Hanaur Oil Works, 86 Tenn. 598; Richardson *v.* Buhl, 77 Mich. 632; Texas & Pacific Ry. Co. *v.* Southern Pacific Ry. Co., 41 La. An. 971; Samuels *v.* Oliver, 130 Ill. 73; Pittsburgh Carbon Co. *v.* McMillin, 119 N. Y. 46; Emery *v.* The Ohio Candle Co., 47 Ohio St. 320; American Preservers' Trust *v.* Taylor Manufacturing Co., 46 F. R. 152; American Biscuit & Manufacturing Co. *v.* Klotz, 44 F. R. 721; Strait *v.* National Harrow Co., 18 N. Y. Sup. 224; DeWitt Wire Cloth Co. *v.* New Jersey

Wire Cloth Co., 9 Ry. & Cor. L. J. 314; Texas Standard Cotton Oil Co. *v.* Adone, 19 S. W. R. 274; Whalen *v.* Brennan, 51 N. W. R. 759.

Some of the results of the leading decisions may be stated briefly as follows: —

1. *The fact that the "monopoly" has cheapened prices will not be considered.*

(*a*) "Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. *It may be true that it improved the quality and cheapened the cost of petroleum and its products to the consumer. But such is not one of the usual or general results of a 'monopoly;' and it is the policy of the law to regard, not what may, but what usually happens.*" — State *v.* Standard Oil Co., 30 N. E. R. 279, 290.

(*b*) "*It is possible that such a 'monopoly' may be used, as the defendants suggest, to introduce economies and cheapen coal; but it does violence to our knowledge of human nature to expect such a result.*" — Attorney-General *v.* Central R. R. Co. of New Jersey, 24 Atl. R. 964.

2. *The people as a body ought not to be "employés" and "servants."*

"*A society in which a few men are the employers, and the great body are merely employés or servants, is not the most desirable in a republic;* and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime." — State *v.* Standard Oil Co., 30 N. E. R. 279, 290.

3. *It makes no difference whether the "monopoly" be created by "contract" or "patent."*

"It is true in the case just cited the 'monopoly' had been created by letters patent. *But the objections lie not to the manner in which the 'monopoly' is created.* The effect on industrial liberty and the price of commodities will be the same, whether created by patent or by an extensive combination among those engaged in similar industries, controlled by one management." — State *v.* Standard Oil Co., 30 N. E. R. 279, 290.

"*The 'monopoly' with which the law deals is not limited to the strict equivalent of royal grants or people's patents.* Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance prices to the detriment of the public, is a legal 'monopoly.'" — BARRETT, J., People *v.* North River Sugar Refining Co., 54 Hun, 354, 376.

4. *A "monopoly" can exist even if the article be "susceptible" of "indefinite production."*

"And this rule [*i. e.*, that the 'monopoly' is a 'monopoly'] is applicable to every 'monopoly,' *whether the supply be restricted by nature, or susceptible of indefinite production.* The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible." — BARRETT, J., People *v.* North River Sugar Refining Co., 54 Hun, 354, 376.

5. *The "monopoly" need not be "permanent" or "complete."*

"*Nor need it* [*i. e., the 'monopoly'*] *be permanent or complete.* It is enough that it may be even temporarily and particularly successful. The question in the end is, Does it inevitably tend to public injury?" — BARRETT, J., People *v.* North River Sugar Refining Co., 54 Hun, 354, 376.

6. *There is a "monopoly" if there is a "limitation" of "competition," and "production," with a view to "advance prices."*

"And where that appears to be the fact [*i. e.*, limiting of the supply, when that can be properly done, and advancing the prices of the products produced], the agreement, association, combination, or whatever else it may be called, having for its objects the *removal of competition* and the *advancement of prices of necessaries of life*, is subject to the condemnation of the law, by which it is denounced as a criminal enterprise." — DANIELS, J., People *v.* North River Sugar Refining Co., 54 Hun, 356, 379.

The foregoing fairly represents the American doctrine wherever it has been necessary for the courts to express an opinion upon the matter.

The English courts, however, seem to have taken a less rigorous view; they have held, —

1. *That there may be "combinations of capital" in "indefinite amounts."*

(*a*) "*Thus, the stream of modern legislation runs strongly in favor of allowing great combinations of persons interested in trade, and intended to govern or regulate the proceedings of large bodies of men, and thus, necessarily, to interfere with what would have been the course of trade, if unaffected by such combinations.* I therefore conclude that the combination in the present case cannot be held illegal, as opposed to the policy of the law." — FRY, J., Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. 23 Q. B. D. 598, 627.

(*b*) "The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the

head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases; there is a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause, — is evidence — to use a technical expression — of malice. *But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible, — would be only another method of attempting to set boundaries to the tides.*"—FRY, J., Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. 23 Q. B. D. 598, 614, 617.

2. There may be "increase of business" to the "injury of *another.*"

(*a*) "It remains to inquire whether the authorities assist in the decision of the question before us. As regards an individual, I have already pointed out that for one man to interfere with the lawful trade or business of another by molestation or any physical interference, or by fraud or misrepresentation, may be an actionable wrong. *But no authority appears to show that for one man to injure the business of another by mere competition, even though it may be successfully directed to driving the rival out of the town where he dwells or out of the business which he carries on, is actionable. And the silence of the books is strong evidence that such acts are not actionable.*"—FRY, J., Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. 23 Q. B. D. 598, 627.

(*b*) "But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the *entire tea freights* of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. *To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection.*" — FRY, J., Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. 23 Q. B. D. 598, 614, 617.

(*c*) "*If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.*" — FRY, J., Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. 23 Q. B. D. 598, 614, 617.

(*d*) "I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. *The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law.*" — FRY, J., Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. 23 Q. B. D. 598, 614, 617.

VI.

"MONOPOLY" UNDER THE NATIONAL "ANTI-TRUST ACT."

There have been the following attempts at definition of this word in decisions under the Anti-Trust Act: —

1. "The second section is limited by its terms to '*monopolies*,' and evidently has as its basis the *engrossing* or *controlling* of the market." — PUTNAM, Circuit Judge, Circuit Court, Mass., United States *v.* Patterson, 55 F. R. 605, 640.

2. "A 'monopoly,' in the prohibited sense, involves the element of an *exclusive* privilege or grant which restrained others from the exercise of a right or liberty which they had before the 'monopoly' was secured. *In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity to the detriment of the public.* As defined by Blackstone (4 Bl. Comm. 159), and by Lord Coke (3 Co. Inst. 181), it is a grant from a sovereign power of the State by commission, letters patent, or otherwise, to any person or corporation, by which the *exclusive* right of buying, selling, making, working, or using anything is given. When this section of the Act was under consideration in the Senate, distinguished members of its judiciary committee and lawyers of great ability explained what they understood the term 'monopoly' to mean; one of them saying, 'It is the *sole engrossing* to a man's self by means which prevent other men from engaging in fair competition with him.' Another senator defined the term in the language of Webster's Dictionary: 'To engross or obtain, by any means, the *exclusive* right of, especially the right of trading to any place or with any country or district; as to "monopolize" the India or Levant trade.' *It will be noticed that, in all the foregoing definitions of 'monopoly,' there is embraced two leading elements; viz., an exclusive right or privilege, on the one side, or a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the 'monopoly' was secured.* This

being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the States must be an attempt to secure or acquire an *exclusive* right in such trade or commerce by means which prevent or restrain others from engaging therein. It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Company to *own* seventy distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their *ownership* and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the 'monopoly,' or attempt to 'monopolize' the interstate trade or commerce therein. In this acquisition and operation of the seventy distilleries, which enabled the accused or said Distilling & Cattle Feeding Company to manufacture and control the sale of seventy-five per cent of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. *All other persons who chose to engage therein were at liberty to do so.* The effort to control the production and manufacture of distilling products, *by the enlargement* and *extension of business*, was not an attempt to 'monopolize' trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration." — JACKSON, Circuit Judge, Circuit Court, S. D. Ohio, W. D., *In re* Greene, 52 F. R. 104, 115.

3. "A 'monopoly' is defined by Mr. Justice Story to be an '*exclusive* right, granted to a few, of something which was before of common right;' and by Lord Coke to be 'an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the *sole* buying, selling, making, working, or using of everything whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.'" — RINER, District Judge, Circuit Court, Kans., United States *v.* Trans.-Mo. Freight Association, 53 F. R. 440, 452.

The following have been held not "monopolies":—

1. Indefinite increase of business.

(*a*) "Congress may place restriction and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. *But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which*

such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit." — JACKSON, Circuit Judge, Circuit Court, S. D. Ohio, W. D., *In re* Greene, 52 F. R. 104, 112.

(*b*) "It is not very clear what Congress meant by the second section of the Act of July 2, 1890, in declaring it a misdemeanor to 'monopolize,' or 'attempt to monopolize,' any part of the trade or commerce among the States or with foreign nations. It is very certain that Congress could not, and did not, by this enactment attempt to prescribe limits to the acquisition, either by the private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offence was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities which form the subjects of commerce, will, in a popular sense, 'monopolize' both State and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. *But the magnitude of a party's business production, or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the 'monopoly,' or attempt to 'monopolize,' which the statute condemns.*" — JACKSON, Circuit Judge, Circuit Court, S. D. Ohio, W. D., *In re* Greene, 52 F. R. 104, 115.

2. Fixing of arbitrary prices.

"The first question is, Does it constitute a violation of the statute for *two or more dealers to fix an arbitrary price* for their goods? *No authority has gone to the extent of holding that such a transaction, in the absence of other facts, is illegal.*" — COXE, District Judge, Circuit Court, S. D. N. Y., Dueber Watch Case Manufacturing Co. *v.* Howard Watch & Clock Co., 55 F. R. 851, 853.

3. Agreement not to trade with any one who trades with others than the covenantors.

"The second question is: Is it an illegal act, within the provisions of the law in question, for two or more traders to agree among themselves that they will not deal with those who prefer to purchase the goods of another designated trader in the same business? Many perfectly legiti-

mate reasons might be suggested for such an agreement. It is not a combination to 'monopolize;' at least, there is no statement of facts tending to show that it produced a 'monopoly' in the present case. Indeed, it would seem that it must have had a contrary effect. *There was surely nothing to prevent the plaintiff from supplying its customers with those things which the defendants declined to sell them, and thus enlarge its trade and stimulate competition. The plaintiff was perfectly free to engage in every branch of the watchmaking business. So were all others.* The plaintiffs' customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer." — COXE, District Judge, Circuit Court, S. D. N. Y., Dueber Watch Case Manufacturing Co. *v.* Howard Watch & Clock Co., 55 F. R. 851, 853.

It is impossible now to say what the effect of the Act, as interpreted by the courts, will finally be. It must be plain, however, that there cannot be any operative construction of the statute, which confines "monopoly" under it to an "exclusive control," and that there are grave doubts whether, indeed, there can be any construction of it such as to render it constitutional. No attempt has been made here to discuss the first section, or to cite authorities thereupon; but if Judge Putnam be right in his expression of opinion in United States *v.* Patterson, cited *supra*, this section is to take color from the second, and is likely, therefore, to stand or fall with it. But one conclusion, upon the whole, can be reached. The Act is necessarily vague, because, in men's minds, the evil dreaded is vague, and like words, therefore, have been used to express it. The English judges seem to have been clearly conscious of the difficulties ahead when, in Mogul Steamship Co. *v.* McGregor, Gow & Co., L. R. 23 Q. B. D. 598, 614, 617, Fry, J., said: "I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on, in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial 'reasonableness,' or of 'normal prices,' or 'fair freights,' to which commercial adventurers, otherwise innocent, were bound to conform."

William F. Dana.